



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 19, 2004

Mr. Chris M. Borunda
Ray, Valdez, McChristian & Jeans
5822 Cromo Drive
El Paso, Texas 79912

OR2004-9884

Dear Mr. Borunda:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 213170.

The City of Socorro (the "city"), which you represent, received a request for information relating to the death of a named individual. You inform us that the city has no responsive fire department or emergency medical service records. We note that the Act does not require the city to release information that did not exist when it received this request or to create responsive information.¹ You indicate that the city neither holds nor has access to a responsive videotape. We also note that the Act does not require a governmental body to take affirmative steps to create or obtain information that is not in its possession, so long as no other individual or entity holds that information on behalf of the governmental body that received the request for the information.² You inform us some of the requested information has been released. You have submitted other information that you claim is excepted from disclosure under sections 552.103 and 552.108 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.

Initially, we address your representation that the submitted grand jury subpoena was served on the city police department. This office has concluded that a grand jury is not a governmental body that is subject to the Act, so that records that are within the actual or

¹See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

²See Gov't Code § 552.002(a); Open Records Decision Nos. 534 at 2-3 (1989), 518 at 3 (1989).

constructive possession of a grand jury are not subject to disclosure under the Act. *See* Gov't Code § 552.003(1)(B) (definition of governmental body does not include the judiciary); Open Records Decision No. 513 at 3 (1988) (information held by grand jury, which is extension of judiciary for purposes of Act, is not itself subject to Act). When an individual or an entity acts at the direction and as an agent of the grand jury, information prepared or collected by the agent is within the grand jury's constructive possession and is not subject to the Act. *See* Open Records Decision No. 513 at 3. Information that is not so held or maintained is subject to the Act and may be withheld from disclosure only if a specific exception to disclosure is shown to be applicable. *Id.*

On the basis of your representations, we are unable to determine whether the city has custody of any of the submitted information as an agent of the grand jury. To the extent, however, that such is the case, any such information is in the grand jury's constructive possession and is therefore not subject to the Act. This decision does not address the public availability of any such information. To the extent that the city does not have custody of the submitted information as an agent of the grand jury, the information is subject to the Act, and we address your arguments against its public disclosure.

Next, we note that the submitted documents include a custodial death report. In 2003, the Office of the Attorney General (the "OAG") revised the format of a custodial death report. Previously, the report consisted of five sections. In Open Records Decision No. 521 at 5 (1989), we concluded that under article 49.18(b) of the Code of Criminal Procedure in conjunction with a directive issued by the OAG, section one of a custodial death report filed with this office was public information and must be released, but sections two through five of the report, as well as attachments to the report, were confidential. *See* Crim. Proc. Code art. 49.18(b) (attorney general shall make report, with exception of any portion of report that attorney general determines is privileged, available to any interested person). A custodial death report now consists of two pages and an attached summary of how the death occurred. The OAG has determined that the two-page report and summary must be released to the public; however, any other documents submitted with the revised report are confidential under article 49.18 of the Code of Criminal Procedure.³ In this instance, the submitted documents include the revised custodial death report form and a summary of how the death occurred. The city must release these documents, which we have marked, under article 49.18 of the Code of Criminal Procedure.

The city seeks to withhold the rest of the submitted information under section 552.103 of the Government Code. This exception provides in part:

- (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or

³Please see the enclosed letter from the Criminal Law Enforcement Division of the OAG.

employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body that raises section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that: (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information *and* (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See Open Records Decision No. 452 at 4 (1986).* To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.* Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), *see Open Records Decision No. 336 (1982)*; (2) hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see Open Records Decision No. 346 (1982)*; and (3) threatened to sue on several occasions and hired an attorney, *see Open Records Decision No. 288 (1981).*

You inform us that the city has received letters from two different attorneys who represent members of the deceased individual's family, giving notice of their intent to pursue legal action against the city regarding the death. You have submitted copies of the attorneys' letters. You also assert that the rest of the submitted information relates to the anticipated litigation. Based on your representations and the documentation that you have submitted, we find that you have demonstrated that the city reasonably anticipated litigation on the date of its receipt of this request for information. We also find that the rest of the submitted information relates to the anticipated litigation. We therefore conclude that the city may withhold the remaining information at this time under section 552.103.

In reaching this conclusion, we assume that the opposing parties in the anticipated litigation have not seen or had access to any of the remaining information. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that relates to the litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). If the opposing parties have seen or had access to information that relates to anticipated litigation, through discovery or otherwise, then there is no interest in withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Furthermore, the applicability of section 552.103 ends when the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary: (1) to the extent that the submitted information is held by the city as an agent of the grand jury, such information is not subject to the Act, and this decision does not address its public availability; (2) the city must release the custodial death report and the summary of the death under article 49.18 of the Code of Criminal Procedure; and (3) the city may withhold the rest of the submitted information under section 552.103 of the Government Code. As we are able to make these determinations, we need not address your claim under section 552.108.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor

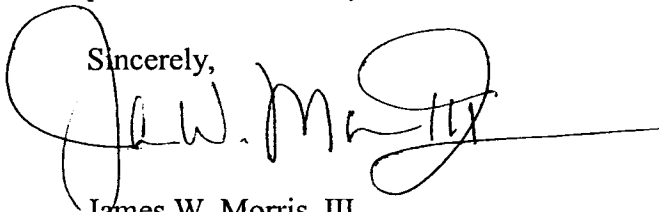
should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'J.W. Morris, III', with a long horizontal line extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 213170

Enc: Submitted documents

c: Mr. Jim Scherr
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El Paso, Texas 79901
(w/o enclosures)